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August 23, 2011

Ms. Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

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AUG 23 2011
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Re: *Petition of Arkansas Electric Cooperative Corporation for a Declaratory Order,*
STB Finance Docket 35305

Dear Ms. Brown:

Enclosed for filing in the above-captioned matter is BNSF Railway Company's ("BNSF") Reply to Western Coal Traffic League's Petition to Reopen and for Injunctive Relief Pending Board-Supervised Mediation.

BNSF's Reply is supported by verified statements of Mr. Stevan B. Bobb and Dr. G. David Emmitt. Because the verified statement of Dr. Emmitt contains confidential information, BNSF is separately filing under seal a confidential version of Dr. Emmitt's verified statement. A public version of Dr. Emmitt's verified statement is attached to BNSF's Reply for filing in the public docket.

If you have any questions, please do not hesitate to contact me.

Sincerely,


Samuel M. Sipe, Jr.

Enclosures
cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35305

**PETITION OF ARKANSAS ELECTRIC COOPERATIVE
CORPORATION FOR A DECLARATORY ORDER**

**BNSF RAILWAY COMPANY'S REPLY TO
WESTERN COAL TRAFFIC LEAGUE'S PETITION TO
REOPEN AND FOR INJUNCTIVE RELIEF
PENDING BOARD-SUPERVISED MEDIATION**

Pursuant to the Board's order issued on August 18, 2011, BNSF Railway Company ("BNSF") hereby responds in opposition to the Petition to Reopen and for Injunctive Relief Pending Board-Supervised Mediation, filed by Western Coal Traffic League on August 12, 2011 ("WCTL Petition").

I. Introduction

WCTL asks the Board to reopen the coal dust proceeding and stay BNSF's coal dust rule while the parties in the prior coal dust proceeding engage in broad, undefined mediation. WCTL's Petition is a delay tactic. The Board has already concluded that coal dust escaping from loaded coal cars poses a serious risk to the integrity of Powder River Basin ("PRB") rail operations and that shippers, as the owners of the coal and the parties responsible for loading the cars, bear responsibility for mitigating coal dust emissions. BNSF has been diligently pursuing a solution to this acknowledged coal dust problem for over six years, and it would be highly imprudent to delay adoption of mitigation measures any longer given the seriousness of the coal dust problem as well as the conclusions reached by the Board in its March 3, 2011 Decision in this proceeding. WCTL's request that BNSF be precluded from implementing any coal dust

operating rule pending mediation is just a continuation of WCTL's prior efforts to put off for as long as possible acceptance of responsibility by some shippers for coal dust emissions from loaded coal cars. WCTL's tactic for further delaying the adoption of coal dust mitigation measures should be rejected out of hand.

There are many reasons why the Board should not reopen the coal dust proceeding at this time. First, the Board has already found that coal dust emissions are a serious problem and said that BNSF has the right to take measures to limit them. The Board also found that BNSF had reasonably concluded that containment of coal dust in loaded cars was superior to after-the-fact clean-up of coal dust and maintenance of the right of way. The Board further concluded that BNSF could address the coal dust problem by adopting loading requirements that would ensure that the shippers' freight remains in the loaded coal cars. WCTL's request to have the Board enjoin BNSF's coal dust rule while the parties revisit these issues in a mediation is totally unwarranted. There is no basis to delay implementation of BNSF's operating rule to address in mediation issues that have already been decided.

The Board found BNSF's prior coal dust operating rule to be unreasonable because that rule included an approach to monitoring coal dust losses that made it impossible for shippers to know with certainty at the time they loaded the coal cars whether they would be found to be in compliance with the rule. But the Board suggested that BNSF could address this concern by offering shippers a "safe harbor" whereby a shipper would be deemed in compliance with BNSF's loading requirements if it engaged in specified conduct. BNSF's new operating rule does precisely that.

The safe harbor provides that a shipper will be deemed in compliance with BNSF's loading requirement if the shipper applies one of three specified chemical surfactants (topper

agents) to the loaded coal cars. In its March 2011 decision, the Board acknowledged that the application of surfactants, in conjunction with coal car grooming, appears to be the only commercially available approach to reducing coal dust emissions. WCTL's complaint about the safe harbor, without any suggestion of an alternative approach, is evidence that its true objective is to avoid taking any measures at all to address coal dust. Indeed, if a shipper believes that there is a viable alternative to surfactant application that would reduce coal dust emissions, BNSF's rule would allow the shipper to pursue that option if the shipper can demonstrate the effectiveness of the alternative. Mediation over alternatives that do not appear to exist and have never been proposed would be a waste of time, which seems to be WCTL's objective.

Second, the question of who bears the costs of coal dust mitigation is not a proper subject of mediation. Commercial discussions about cost sharing are inappropriate in a group mediation and would raise serious antitrust issues. In addition, most of BNSF's coal traffic moves under confidential contracts that are not subject to regulation by the Board. Many of those contract customers have agreed to implement coal dust mitigation as part of the overall package of services, rates and terms that were negotiated between BNSF and the shipper. Arrangements between BNSF and its contract shippers would not be a permissible subject of group mediation. Moreover, any pronouncement that the Board might make about cost sharing in a reopened proceeding would have to make clear that it does not apply to BNSF's contract movements.

Third, it is possible that disputes could arise in the future over specific plans by individual common carrier shippers to comply with BNSF's operating rule, or with any enforcement measures that BNSF adopts, if necessary, to ensure effective coal dust mitigation. But it is premature to reopen the coal dust proceeding at this time to mediate issues that have not yet arisen. Shippers have not even filed their compliance plans with BNSF, which is only the

initial step in the process of implementing coal dust remediation measures. Moreover, if disputes arise in the future with individual common carrier shippers, mediation with those specific shippers might be appropriate, but mediation on a broader basis would not. BNSF does not believe that any mediation with WCTL, a trade association representing some coal shippers, would be appropriate or productive.

Finally, the Board should reject WCTL's request for a stay or injunction of BNSF's rule for the same reason that the Board declined to enjoin BNSF's prior coal dust operating rule. As explained by Stevan Bobb, BNSF's Group Vice President, Coal Marketing, the objective of BNSF's current coal dust loading rule is to have BNSF's shippers begin taking steps toward implementing coal dust mitigation measures by October 1, 2011 by establishing a compliance plan. BNSF recognizes that the implementation of shipper compliance plans may take some time. Moreover, BNSF is willing to commit, as it did in the prior coal dust proceeding, that it will give at least 60 days' notice before it takes any enforcement action with regard to a particular shipper to give the affected shipper the opportunity to seek Board intervention if necessary. This commitment was a sufficient basis for denying injunctive relief in the prior proceeding, and it eliminates any need for injunctive relief here.

As explained by Mr. Bobb, BNSF is making progress on implementation of coal dust mitigation measures through discussions with individual shippers and PRB coal mines. An injunction of BNSF's coal dust rule could bring this progress to a complete halt. The Nation cannot afford the consequences of an interruption in the energy supply chain. Given the serious risk to the integrity of PRB rail lines that is posed by coal dust, it would be improper for the Board to give some shippers an excuse to continue putting off efforts to mitigate coal dust emissions – even putting into place a compliance plan, which is a sufficient measure to be taken

by October 1, 2011 – by enjoining BNSF's coal dust loading rule before there is any concrete dispute, which may never arise, over how that rule will be implemented or enforced.

II. Factual Background

In May 2005, within days of one another, two derailments occurred on the Joint Line that were caused in large part by coal dust that had destabilized the track structure. The two derailments resulted in a serious disruption in PRB coal operations and the supply of coal to coal-fired electric generating facilities in a large part of the country. The Joint Line derailments led BNSF to pursue an intensive study of coal dust and coal dust fouling over the next few years.

The record developed in this proceeding contains extensive evidence of the conclusions that BNSF reached through those studies. BNSF confirmed the pernicious nature of coal dust as a contaminant of rail ballast, a conclusion that has been acknowledged by the Board and the Federal Railroad Administration. BNSF also concluded that coal dust fouling cannot responsibly be dealt with through expanded maintenance. Given the pernicious characteristics of coal dust and the unpredictability of its dispersal and effects on track structure, the risk of destabilized track structure cannot be eliminated through maintenance activity alone. Coal dust must be dealt with by keeping the coal in the loaded coal cars. BNSF also studied methods for limiting coal dust losses from loaded coal cars, and it found that the use of chemical surfactants, or topper agents, particularly in tandem with proper grooming of coal loads, can substantially eliminate coal dust emissions.

At the conclusion of these studies, BNSF issued its original coal dust rule in the Spring of 2009. Shortly before the effective date of the rule, Arkansas Electric Cooperative Corporation ("AECC") filed a petition to stay the coal dust rule and for issuance of a declaratory order that the rule was an unreasonable practice. BNSF did not oppose a proceeding that would address the

evidence justifying adoption of a coal dust mitigation rule. The Board therefore initiated a proceeding. BNSF produced a vast amount of information that had been developed in the course of BNSF's studies on the issue, and evidence and argument was submitted to the Board.

On March 3, 2011, the Board served its decision in this matter. The decision made several findings of law and fact that are relevant to WCTL's current petition. Specifically, the Board agreed with BNSF that coal dust fouling poses a serious risk to track stability and the operational integrity of BNSF's coal network. *Arkansas Elec. Coop. Corp.—Petition for Declaratory Order*, STB Fin. Docket No. 35305, at 6-8 (STB served Mar. 3, 2011) ("March 2011 Decision"). Moreover, since the "weight of the evidence shows that coal dust is a harmful foulant that could contribute to future accidents by destabilizing tracks," the Board concluded that "coal dust is a particularly harmful contaminant of ballast that requires corrective action." *Id.* at 6-8 (emphasis added). The Board's conclusion was confirmed by FRA's research. FRA concluded that coal dust has "particularly destructive qualities . . . on ballast." DOT Rebuttal Comments at 2 (filed June 4, 2010).

The Board also concluded that BNSF has a right to establish car loading rules that would require coal shippers to take measures to keep their freight in the car. The Board specified that "BNSF may address coal loss from open-top cars." March 2011 Decision, at 8. The Board further concluded that BNSF may address coal loss from open top cars through reasonable loading requirements. *Id.* at 11.

In response to the shippers' claim that BNSF should be forced to deal with coal dust through after-the-fact clean-up and maintenance, the Board found that BNSF's "conclusion that containment is superior to maintenance alone is reasonable." *Id.* at 9. Further, the Board rejected the shippers' contention that BNSF could not impose loading rules that address coal dust

losses without a quantitative cost-benefit analysis. The Board found that "a full cost-benefit analysis is not required by BNSF before it can attempt to control coal dust emissions." *Id.* at 4. The Board specifically rejected the Shipper Interests' proposed cost-benefit analysis because it did not include "all the costs and benefits of each alternative" and "ignores the persistent capacity constraints." *Id.* at 5-6.

Notwithstanding these findings and conclusions of law, the Board concluded that BNSF's specific coal dust rule then before it was not reasonable because the rule failed to "provide shippers with a certain method of compliance that does not depend on the monitoring system." *Id.* at 2, 12. The Board expressed concern that the shippers' questions about BNSF's proposed use of trackside monitors to measure the level of coal dust blown out of coal cars at designated locations along the PRB rail lines had not been adequately addressed by the studies BNSF had made to date. However, the Board explained that an "activity-based safe harbor . . . could go a long way to address our concern" and that the agency "does not want to foreclose the use of emission standards in the future." *Id.* at 12.

While this proceeding was pending, BNSF continued to collaborate with shippers and mines to identify effective ways to deal with coal dust. BNSF facilitated a Super Trial of dust suppressants in the PRB that included participation by Union Pacific Railroad ("UP"), coal shippers, and coal mines. *See* attached Verified Statement of Mr. Stevan B. Bobb ("Bobb V.S.") at 5. The Super Trial involved field tests on numerous trains. Those tests included the use of passive collectors attached to cars loaded with treated and untreated coal, thereby allowing BNSF to quantify the reduction in coal dust attributable to the use of particular topper agents. A Selection Committee composed of shippers and mines provided significant input into the testing procedures and the selection of possible safe harbor surfactants. The Super Trial was conducted

from March through September 2010, and six mines and more than a dozen shippers participated. BNSF provided detailed test results to all participants in the Super Trial. BNSF and UP also publicly released a summary of Super Trial results for the benefit of shippers that did not participate in the Super Trial.

In addition to the collaboration between BNSF and its shippers in the Super Trial, BNSF's marketing and engineering employees have conferred extensively with its shippers regarding coal dust remediation, topper application, and BNSF's coal dust rule. Bobb V.S. at 6. BNSF has contacted its shippers and mines to obtain information regarding their compliance plans in preparation for implementation of BNSF's coal dust rule. Several shippers and mines have already provided information on efforts that they have undertaken to begin implementing coal dust remediation. BNSF also solicited comments regarding its proposed new coal loading rule from a number of its shippers that participated in the Super Trial. Bobb V.S. at 6. WCTL's claim that BNSF adopted its new coal dust rule without prior consultation with shippers is false. BNSF will continue to work with shippers and mines regarding implementation of the revised rule, and BNSF has made clear that it is willing to discuss that subject with any BNSF shipper.

Substantial progress has been made toward the implementation of coal dust remediation measures. As explained by Mr. Bobb, several shippers have begun to implement measures to apply topper agents to loaded cars. Bobb V.S. at 4. At least three of BNSF's contract shippers, including large-volume shippers, are currently treating trains with topper agents. Other shippers have committed to apply topper agents. Four PRB mines are currently applying topper agents to loaded coal cars. Three other PRB mines have already selected a topper agent.

On July 14, 2011, as amended July 20, 2011, BNSF published a new coal loading rule to supersede the rule that the Board had found to be unreasonable in the March 2011 Decision. *See*

BNSF Price List 6041-B, Item 100 (July 20, 2011). The loading rule applies to "all coal cars loaded at Powder River Basin ("PRB") mines by shippers whose coal transportation is subject to this Rules Book." *Id.* § 1. Under the rule, shippers are supposed to provide BNSF with information by September 1, 2011 about their plans to reduce coal dust. And by October 1, 2011, shippers "must take measures to load coal in such a way that any loss in transit of coal dust from the shipper's loaded coal cars will be reduced by at least 85 percent." *Id.* § 2. As Mr. Bobb explains, BNSF's intent is that the requirement in the rule for shippers to "take measures" by October 1, 2011 toward implementation of coal dust remediation means that it is sufficient under the rule that shippers have compliance plans in place by October 1, 2011, recognizing that the actual implementation of those plans, *e.g.*, actual application of surfactants, may in some cases take some time beyond that date. Bobb V.S. at 6-7.

In response to the direction of the Board in the March 2011 Decision, the amended tariff contains a safe harbor provision. Under the amended tariff, a shipper will be "deemed to be in compliance with the loading requirement" if it ensures that the coal cars are profiled according to the attached "Redesigned Chute Diagram" and uses one of three approved topper agents. BNSF Price List 6041-B, Item 100, § 3. The three topper agents were shown to reduce coal dust loss by at least 85% in the 2010 Super Trial. BNSF's rule also gives shippers the option to pursue other efficient and cost-effective alternatives if the shipper can demonstrate that the alternative produces an 85% reduction in coal dust losses from loaded coal cars.

On August 12, 2011, WCTL filed a petition asking the Board to reopen this proceeding for the purpose of conducting Board-supervised mediation with all parties of record. With one exception, WCTL's petition does not specify the issues to be mediated. In addition, WCTL's

petition asks the Board to stay the effective date of the coal dust rule or enjoin the rule while Board-sponsored mediation is conducted.

III. Argument

A. The Board Should Not Reopen The Coal Dust Proceeding Unless Or Until A Specific Dispute Arises With An Individual Common Carrier Shipper Over The Shipper's Compliance With BNSF's Coal Dust Operating Rule.

The Board should not reopen the coal dust proceeding for mediation as requested by WCTL. There are no issues that would be valid subjects of mediation at this time. WCTL's request for mediation is a barely disguised ploy on behalf of some shippers to avoid taking concrete measures to deal with the serious problem of coal dust for as long as possible. WCTL's members do not have identical interests or commercial circumstances, and therefore WCTL could not negotiate on behalf of its members.

The Board has already addressed the fundamental question of whether it is reasonable for BNSF to deal with coal dust through loading requirements, such as the grooming of coal loads and the application of topical agents in the loading process. The suggestion by WCTL that the use of topical treatments may not be an effective means of dealing with coal dust is a frivolous one that does not warrant serious attention. Indeed, the fact that WCTL offers no hint of an alternative to surfactant application is evidence that WCTL's objective is simply to avoid taking any steps to address coal dust. In its purported "Reply" to WCTL's Petition, AECC unabashedly seeks to relitigate the question – already settled by the Board – as to whether shippers should even be required to take any remediation measures. There is no basis for reopening the coal dust proceeding to relitigate issues that have already been addressed through lengthy proceedings and resolved by the Board.

The question of who bears the costs of implementing coal dust remediation in the loading process, a major focus of WCTL's proposed mediation, is also not a proper subject for mediation. As explained below, cost sharing between a railroad and its customer is part of a commercial relationship that should not be the subject of broad, multi-party discussions. Indeed, the Board does not have authority to address commercial relationships that exist between BNSF and its contract customers, and those bilateral relationships would not be the proper subject of multi-party mediation.

Disputes with individual common carrier shippers over the specific measures taken to comply with BNSF's coal dust rule could arise in the future as shippers begin implementing coal dust remediation efforts. But it is too soon to know whether such disputes will arise, and therefore it would be premature to reopen the coal dust proceeding at this time to engage in such mediation. Moreover, if such disputes arise in the future, mediation, if appropriate, would have to take place with individual shippers, not with WCTL.¹

1. WCTL And AECC Improperly Seek Mediation To Revisit Issues That The Board Has Already Addressed And Decided.

In its March 2011 decision, the Board, based on extensive evidence and argument by a large number of interested parties, made several definitive findings that provide the foundation for BNSF's current coal dust rule. WCTL apparently seeks to revisit those findings in a broad mediation and to use that process to enable its members to avoid taking immediate, concrete steps to deal with the coal dust problem.

¹ WCTL claims that the Board has authority to order BNSF to participate in mediation. However, it is clear that "[e]xcept in rate cases handled under the SAC methodology, [the Board's] regulations provide for the use of alternative dispute resolution (ADR), including mediation, only upon the mutual consent of the parties." *BP Amoco Chem. Co. v. Norfolk S. Ry Co.*, STB Docket No. 42093, at 3 (STB served June 6, 2005).

As noted above, the Board determined the following: (1) coal dust is a harmful ballast foulant that can destabilize track structure and lead to serious operating disruptions on critical PRB lines; (2) BNSF reasonably concluded that containment of coal dust in loaded coal cars is superior to after-the-fact clean-up and maintenance; (3) BNSF has the right to establish reasonable coal loading requirements that ensure that shippers' coal remains in the loaded coal cars; and (4) shippers cannot avoid responsibility for taking remediation measures by insisting on a cost-benefit analysis showing that the costs of coal dust remediation are less than the benefits that flow from reducing coal dust. March 2011 Decision, at 6-11.

With the exception of the issue of who bears the costs of coal dust remediation (addressed below), WCTL is silent as to the specific topics it seeks to mediate, suggesting instead a broad, unfocused process. It is reasonable to infer that WCTL seeks to revisit the issues relating to shippers' responsibility for coal dust remediation already decided by the Board. Indeed, AECC's "Reply" to WCTL's Petition makes it clear that WCTL's request for mediation could be viewed by some as a vehicle for revisiting issues that have already been addressed and resolved by the Board. For example, AECC continues to disclaim responsibility for the release of coal dust and maintains that the coal dust problem can be addressed through clean-up and maintenance. *See* AECC Reply at 12-13 (filed Aug. 19, 2011). AECC continues to insist that coal dust on PRB lines is the result of BNSF's operating practices "and not from the deposition of airborne dust that BNSF seeks to control." *Id.* at 12. AECC continues to insist that any approach to coal dust remediation must satisfy a full-blown, quantifiable cost-benefit analysis. *Id.* at 6. The Board has already rejected these positions, and there is no reason to revisit them in a Board-sponsored mediation. Moreover, AECC is not even a BNSF customer, so there is no reason for BNSF to mediate with AECC.

2. WCTL's And AECC's Criticism Of BNSF's Safe Harbor Provision Is A Pretext For Doing Nothing.

While the Board agreed with BNSF on all of the fundamental issues supporting a coal dust loading rule that would address coal dust losses from loaded coal cars, the Board found BNSF's coal dust rule to be unreasonable because it left shippers uncertain when they loaded their coal cars whether they would later be found in compliance with the rule. The Board expressed concern about the procedures that BNSF intended to use to monitor compliance with the quantitative coal dust limits from trackside monitors. The Board suggested that these concerns could be addressed by providing a safe harbor that identified specific activities that shippers could follow and thereby be ensured that they were in compliance with BNSF's rule.

BNSF followed the Board's direction in promulgating its new coal dust loading rule. As described above, BNSF eliminated references to quantitative coal dust limits as measured by trackside monitors and included a safe harbor provision that will give shippers who choose to use the safe harbor certainty that they are in compliance with BNSF's coal dust loading rule. The safe harbor provides that BNSF will deem a shipper to be in compliance with the revised coal dust tariff if the shipper uses a modified coal loading chute and the shipper properly applies one of three chemical surfactants or topper agents specified in the tariff. BNSF Price List 6041-B, Item 100, § 3. As described in the attached verified statement of Mr. Bobb, the safe harbor chemicals were identified through field tests conducted with extensive input from shippers and mines in 2010.

The safe harbor provisions are not the exclusive means by which a shipper can comply with the coal dust rule. BNSF's tariff also provides a mechanism for shippers to "seek inclusion of any other method of coal dust suppression (*e.g.*, compaction or other technology) in the safe harbor provision" by demonstrating that the proposed compliance measure meets the 85%

reduction standard specified in the tariff. *Id.* § 4. A fundamental principle underlying all of BNSF's efforts to address the coal dust problem is that shippers should have flexibility to identify remediation techniques best suited to their needs, so long as those methods produce at least an 85% reduction in coal dust. BNSF has never wanted to impose mandatory remediation methods. Instead, BNSF's goal is to let the market develop cost-effective remediation measures. The new rule advances that goal while giving shippers a safe harbor option.

WCTL's and AECC's purported concerns about the safe harbor are a pretext to mask their objective of delaying implementation of coal dust mitigation measures indefinitely. BNSF has not required shippers to reduce coal dust emissions through the use of the safe harbor alternatives. BNSF has merely given shippers the option of using the specified topper agents to reduce coal dust if they wish to be deemed in compliance with the coal dust requirements and thereby avoid uncertainty without further efforts. If a shipper believes that another topper agent is superior to or equally effective but less expensive than the safe harbor toppers (or if a shipper wishes to use an altogether different remediation approach), the shipper is free to use the alternative approach so as long as it can demonstrate that the alternative reduces coal dust by at least 85%.

To the extent WCTL is suggesting that use of topper agents is ineffective in reducing coal dust, that suggestion is frivolous and ignores the conclusions previously reached by WCTL's own consultant, Dr. Viz. See attached Verified Statement of Dr. G. David Emmitt ("Emmitt V.S.") at 1-2. Topper agents are used everywhere that coal industry participants have sought to reduce coal dust, including Canada, Australia, China and by Norfolk Southern in Virginia. Emmitt V.S. at 2. Indeed, as the Board acknowledged, the use of topper agents has until now

been the only commercially available approach to reducing coal dust. *See* March 2011 Decision, at 12. WCTL has identified no alternative to the use of topper agents.

Other purported concerns about the “science” underlying BNSF’s new coal dust rule are misplaced. AECC’s assertion that BNSF has continued to rely on the IDV methodology in developing the new coal dust rule is simply false. As discussed by Dr. Emmitt, the new coal dust rule is based on the direct measurement of coal dust emitted from treated and untreated coal cars and captured in passive dust collectors. WCTL’s own consultant previously acknowledged that such equipment is used in measuring coal dust losses. Emmitt V.S. at 5. Further, Dr. Emmitt explains that the questions raised by Dr. Viz about the testing procedures and protocols used in identifying the three safe harbor topper agents are based on a misunderstanding about the objectives of the tests and the test results. Emmitt V.S. at 3-4. In any event, if a shipper believes that other topper agents are superior to those identified by BNSF through the extensive testing that BNSF has carried out, that shipper is free to use the alternative if the alternative agent can be shown to reduce coal dust losses by 85%.

Finally, AECC complains that BNSF has not shown that the safe harbor alternatives are cost effective. Again, AECC misses the point. If a shipper believes there is a better, more cost-effective method for reducing coal dust emissions by 85%, BNSF’s rule does not preclude the use of such a method so long as the shipper can demonstrate its effectiveness. The fact that neither AECC nor WCTL has proposed an alternative to the specific safe harbor activities identified in BNSF’s coal dust rule indicates that the questions about cost effectiveness raised by AECC and WCTL are simply intended as an excuse to avoid taking any responsibility for coal dust mitigation.

3. It Would Be Improper To Mediate Over Cost Sharing In A Board-Sponsored Mediation.

A major focus of WCTL's Petition is the question whether BNSF should be required to share in the costs of complying with BNSF's loading rule. As BNSF explained in the prior coal dust proceeding, the question of cost sharing is a red herring. Shippers are ultimately responsible for the costs of transporting their coal, including the costs of keeping the coal in the cars. Those costs are covered in the rates paid to the railroad when the costs are associated with the transportation itself, and they are covered in payments to other parties when the costs are associated with loading or other activities that are not performed by the railroad. To the extent WCTL expects BNSF to absorb certain coal loading costs and to pass those costs on to shippers other than coal shippers, that expectation is improper. Each shipper or group of shippers is responsible for the costs associated with its traffic. To the extent WCTL is concerned that any cost savings that accrue to BNSF because of reduced maintenance will not be passed on to BNSF's shippers, that concern relates to future rate levels. The question of the reasonableness of BNSF's future common carrier rates is not a proper subject of a proceeding regarding remediation of coal dust.

Indeed, even if the question of cost sharing were relevant to BNSF's coal dust rule, antitrust concerns would preclude any effort to engage in broad discussion about the issue in Board-sponsored mediation. WCTL's members could not collectively decide what they will pay a supplier of services like BNSF. Antitrust concerns would also be raised by any discussion of cost sharing that might implicate BNSF's and UP's commercial dealings with shippers for whose traffic they compete. The question of cost sharing raises sensitive commercial issues that should not be discussed in a multi-party setting.

The question of cost sharing involves the commercial relationships between BNSF and its individual shippers. Most of those commercial relationships are defined by the terms of confidential contracts that are not subject to regulation by the Board. As noted by Mr. Bobb, almost 88 percent of BNSF's coal tons in 2011 will be handled under unregulated coal transportation contracts. Bobb V.S. at 4. In the negotiations leading to those contracts, many customers have agreed to implement coal dust mitigation measures. Almost 70 percent of BNSF's contracts now contain coal dust remediation provisions. Those negotiated terms are not the proper subject of Board regulation, and they could not be affected by any action that the Board takes. Since the Board does not have the power to affect cost-sharing arrangements for the majority of BNSF's shippers, it makes no sense to have a Board-sponsored mediation on the issue.

4. It Would Be Premature To Consider Board-Sponsored Mediation Of Compliance Issues With Individual Shippers Until There Is A Concrete Compliance Dispute.

As explained by Mr. Bobb in his attached verified statement, mediation with specific common carrier shippers could become an option in the future if disputes arise with a particular shipper over compliance with BNSF's coal dust rule. Bobb V.S. at 9. However, it would be premature to consider such mediation until a concrete dispute arises. Moreover, such mediation would need to be conducted with individual common carrier shippers, not with WCTL.

Mr. Bobb describes the collaborative process that has led to the new coal dust rule. Shippers and mines have been extensively involved in the testing and data gathering that underlies the safe harbor provisions in the new rule. BNSF has had numerous one-on-one discussions with shippers and mines about coal dust reduction measures and specific plans for compliance with BNSF's coal dust rule. The 2010 Super Trial gave numerous shippers and

mines the opportunity to see how a topper application program could be implemented. BNSF sought input from a number of its shippers on a draft of the BNSF rule.

The time has now come for shippers to adopt specific compliance measures and to start implementing concrete compliance plans. While BNSF's objective is to have compliance plans in place by October 1, 2011, BNSF recognizes that full implementation of shippers' compliance plans may take some time.² Bobb V.S. at 7. As shippers begin to implement their compliance plans, it is possible that questions or disputes may arise with individual shippers over the details of their compliance efforts. If those disputes involve BNSF's contract shippers, BNSF and the shippers will address the dispute under the terms of the individual contracts, and no involvement by the Board would be appropriate. But if a dispute arises with a BNSF common carrier shipper, the possibility of Board-sponsored mediation could be considered at that time.

Moreover, on the question of enforcement, BNSF expects its shippers to work in good faith toward implementation of their compliance plans, so BNSF has not adopted any specific enforcement measures. The lack of specific enforcement provisions should not have any impact on a shipper's efforts to implement coal dust remediation measures. If WCTL seeks to compare the cost of complying with BNSF's coal dust rule to the cost of non-compliance, that is an improper objective. It would be totally inappropriate for a shipper to choose whether to comply with BNSF's coal dust rule based on a comparison of compliance costs with any penalties or costs associated with non-compliance. The risk to the integrity of the PRB rail infrastructure requires that all coal shippers take measures to reduce coal dust emissions.

² Mr. Bobb notes that BNSF has issued a Joint Line operating rule that includes the same 85% coal dust reduction requirement and the same safe harbor provisions as the operating rule that is the subject of WCTL's petition. Bobb V.S. at 8. The Joint Line rule states that all shippers must be in compliance with these requirements "as soon as practicable," an approach that is consistent with the approach that BNSF is taking with respect to the coal dust rule at issue here.

As Mr. Bobb explains, BNSF expects that its shippers will take good faith measures to mitigate coal dust emissions. Bobb V.S. at 7-8. If a common carrier shipper's compliance plan reasonably demonstrates that the shipper will take measures to apply one of the specified safe harbor toppler agents or to adopt some other effective coal dust mitigation measures within a reasonable time period, BNSF will not need to pursue any enforcement measures. If, contrary to BNSF's expectations, it should become necessary to take enforcement action with respect to one or more individual common carrier shippers, Mr. Bobb represents, as BNSF did previously, that BNSF will provide 60 days' advance notice before implementing any enforcement action, enough time to allow any affected common carrier shipper to seek Board intervention or Board-sponsored mediation if it chooses to do so.

Finally, WCTL complains about the liability provisions of the new coal dust rule. But as Mr. Bobb explains, it is industry practice for loading rules to impose liability on the party responsible for and in control of the loading practice. Bobb V.S. at 8. Indeed, WCTL has already recognized that "[s]hippers are required to load their cars 'in a safe manner' for transportation." WCTL Reply Comments at 26 (filed Apr. 30, 2010) (citation omitted). It is the shipper's obligation to keep its freight in the car. BNSF should not be required to assume liability for the consequences of actions the shippers must take to keep their coal in loaded cars.

B. The Board Should Deny WCTL's Petition Seeking A Housekeeping Stay Or Injunctive Relief.

The Board has already concluded that coal dust escaping from loaded coal cars poses a serious risk to the integrity of PRB rail operations. As the Board noted in the March 2011 Decision, "[c]learly, this is a problem that must be addressed." March 2011 Decision, at 14. Mr. Bobb explains in the attached statement that BNSF is making substantial progress with its shippers and with PRB mines to address the coal dust problem. Bobb V.S. at 4. This progress

could come to a halt if the Board were to enjoin BNSF's revised coal dust tariff. The public interest in the safe, reliable, and efficient transportation of PRB coal weighs strongly against enjoining the revised coal dust tariff. Moreover, Mr. Bobb represents that BNSF is committed to providing 60 days' notice before taking any enforcement action. Bobb V.S. at 8. Based on an identical commitment from BNSF earlier in this proceeding, the Board denied WCTL's and AECC's petitions to stay or enjoin BNSF's original coal dust tariff because no coal shipper faced irreparable harm. The result should be the same here.

1. Neither WCTL Nor AECC Has Standing To Seek Injunctive Relief.

As a threshold matter, neither WCTL nor AECC has standing to seek an order enjoining BNSF's revised coal dust tariff. WCTL and AECC are not common carrier shippers of PRB coal. WCTL is a voluntary association of coal shippers. AECC is a partial owner of coal-fired electric generating facilities that receive coal under transportation contracts with Union Pacific Railroad Company. See UP Opening Comments at 17 (filed Mar. 16, 2010). BNSF has no common carrier obligation to WCTL or AECC, and BNSF has no other legal or commercial obligation to WCTL or AECC that could provide the basis for a claim for injunctive relief. For these reasons alone, the Board should deny WCTL's Petition for a stay or for injunctive relief.

Additionally, WCTL does not have standing to seek an injunction under established standards of association standing. Under *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000), "an association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Some of WCTL's members are contract shippers that do not have standing to challenge BNSF's coal dust rule.

H.B. Fuller Co. v. S. Pac. Transp. Co., 2 S.T.B. 550, 551 (1997) (dismissing complaint that challenged common carrier storage and demurrage terms that were incorporated into a contract because “it is undisputed that the involved transportation moved under contract”). Moreover, as explained above, any issues that might become the proper subject of Board-sponsored mediation are issues that involve the specific circumstances of individual common carrier shippers. Since the participation of those shippers in any mediation would be necessary, WCTL fails the third prong of the *Laidlaw* association standing test.

2. Under *Holiday Tours*, Injunctive Relief Is Available Only Under Extraordinary Circumstances That Do Not Exist Here.

WCTL’s request for injunctive relief is subject to the requirements of 49 U.S.C. § 721(b)(4). The statute states in relevant part that “the Board may, ‘when necessary to prevent irreparable harm, issue an appropriate order without regard to’ the procedural requirements of 5 U.S.C. § 551-559.” *Arkansas Elec. Coop. Corp. – Petition for Decl. Order*, STB Docket No. FD 35305, at 2 (STB served Nov. 5, 2010) (“November 2010 Decision”). Injunctive relief is available only under extraordinary circumstances. *Gen. Ry. Corp. d/b/a Iowa N.W.R.R. – Exemption for Acquisition of Line – In Osceola & Dickinson Counties*, STB Fin. Docket No. 34867, 2007 WL 2022134, at *1 (STB served July 13, 2007). To obtain injunctive relief, WCTL must demonstrate the following: “(1) it is likely to succeed on the merits; (2) it will be irreparably harmed in the absence of the requested relief; (3) issuance of the injunction will not substantially harm other parties; and (4) granting the injunction is in the public interest.” *Id* (citing *Washington Metro. Area Transit Comm’n v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977)) (other citations omitted). The Board has referred to these elements as the *Holiday Tours* factors. *Seminole Elec. Coop., Inc. v. CSX Transp. Inc.*, STB Docket No. 42110, at 4 (STB

served Dec. 22, 2008). “A party seeking a stay carries the burden of persuasion on all of the” *Holiday Tours* factors. November 2010 Decision at 2.

Since Congress intended to provide railroads with the initiative to establish rates and rules applicable to the service they provide, a party seeking to enjoin railroad conduct while a challenge to that conduct is pursued must present a “strong case that an injunction is warranted.” *Seminole Elec. Coop., Inc. v. CSX Transp. Inc.*, STB Docket No. 42110, at 3 (STB served Dec. 22, 2008).

3. The Board Has Already Concluded That A Housekeeping Stay Would Not Be Appropriate.

WCTL attempts to escape the requirements of 49 U.S.C. § 721(b)(4) and the demanding *Holiday Tours* test by asking for relief in the form of a “housekeeping stay.” WCTL Petition at 12. WCTL fails to mention that the Board has already found that a “housekeeping stay” cannot be used to avoid the requirements of 49 U.S.C. § 721(b)(4). In September 2010, WCTL and other coal shipper organizations requested that the Board issue a “housekeeping stay” enjoining BNSF’s original coal dust tariff. Sept. 30, 2010 Coal Shipper Organizations’ Mot. for a Housekeeping Stay (filed Sept. 30, 2010). WCTL and the coal shipper organizations argued that they could obtain a housekeeping stay without satisfying the requirements of 49 U.S.C. § 721(b)(4) and the *Holiday Tours* test. *See id.* at 2 n.1. The Board summarily rejected this argument. The Board concluded that because WCTL and the coal shipper organizations sought “an order enjoining BNSF from instituting its tariff,” their request was “properly analyzed under 49 U.S.C. § 721(b)(4)” and the *Holiday Tours* test. November 2010 Decision, at 2

4. WCTL Has Not Satisfied Any Of The *Holiday Tours* Factors.

a. Likelihood Of Success On The Merits.

In order to satisfy the first *Holiday Tours* factor, WCTL must show a “substantial likelihood of success on the merits.” *DeBruce Grain, Inc v. Union Pac. R.R. Co.*, 2 S.T.B. 773, 775 n.3 (1997) (citing *Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977)). WCTL cannot make this showing. For the reasons explained in Section III.A above, the arguments raised by WCTL, whether considered independently or collectively, fail to demonstrate a likelihood—let alone a substantial likelihood—that WCTL can show that BNSF’s revised coal dust tariff is unreasonable.

b. No Coal Shipper Will Be Irreparably Harmed If the Board Denies WCTL’s Petition for Injunctive Relief.

Injunctive relief is available only to “prevent irreparable harm.” 49 U.S.C. §721(b)(4). That irreparable harm must also be “actual and imminent.” *Tri-State Brick & Stone of New York, Inc., & Tri-State Transp., Inc.—Petition for Declaratory Order*, STB Fin. Docket No. 34824, 2008 WL 367670, at *2 (STB served Feb. 12, 2008). Speculative allegations of possible future harm cannot support an injunction: “The party seeking a stay is required to demonstrate that the injury claimed is imminent, ‘certain and great.’” *Sault Ste. Marie Bridge Co.—Acquisition & Operation Exemption—Lines of Union Pac. R.R. Co.*, STB Fin. Docket No. 33290, 1997 WL 26998, at *5 (served Jan. 24, 1997) (quoting *Consolidated Rail Corp.—Abandonment—Between Corry & Meadville, in Erie & Crawford Counties, PA*, ICC Docket No. AB-167 (Sub-No. 1139), at 7 (ICC served Oct. 5, 1995) (internal citations omitted)).

WCTL has not come close to meeting this standard. WCTL itself is not a coal shipper and could not experience any harm as a result of BNSF’s coal dust rule remaining in effect. Moreover, as noted above, BNSF expects that its shippers will comply with the revised coal dust

tariff, but BNSF has not established any specific measures to enforce compliance with the tariff, and BNSF has committed to provide at least 60 days' notice before undertaking enforcement measures against any common carrier shipper that is not in compliance. The Board found that an identical commitment provided by BNSF with respect to the original coal dust tariff removed any possibility of irreparable harm. *See November 2010 Decision*, at 3 (denying petitions for injunctive relief because BNSF's commitment to provide 60 days' notice resulted in there being "no imminent, irreparable harm to any shippers given that shippers face no current possibility of a sanction for noncompliance").

It appears that WCTL recognizes that BNSF's commitment to provide advance notice eliminates the possibility of irreparable harm. *See WCTL Petition* at 23 (stating that "[i]n contrast to its *Dust I* actions, BNSF has not represented to shippers that it will provide any notice – much less 60 days notice – of the penalties it plans to impose . . ."). BNSF's commitment to provide 60 days' notice of any enforcement actions therefore removes WCTL's grounds for seeking an injunction.

c. Enjoining BNSF's Coal Dust Rule Would Injure BNSF And Would Harm The Public Interest.

WCTL also cannot satisfy either of the remaining two *Holiday Tours* factors. The interests of BNSF, other stakeholders in the coal transportation supply chain, and the general public weigh strongly against enjoining BNSF's revised coal dust tariff. The Board has already concluded that coal dust escaping from loaded coal cars poses a serious risk to the integrity of PRB rail operations. It is indisputable that the coal transportation supply chain is of vital importance to the national and world economy. *March 2011 Decision*, at 14.

As Mr. Bobb explains, BNSF has been making substantial progress in working with its individual shippers to address the coal dust issue. *Bobb V.S.* at 4. Several BNSF shippers have

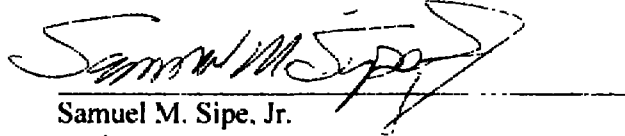
already begun to implement measures to apply topper agents to loaded cars. Four PRB mines are currently applying topper agents to loaded coal cars. All of these efforts could come to a halt if the Board enjoins BNSF's revised coal dust tariff. Indeed, some shippers that began to apply topper agents to control coal dust have stopped. BNSF is concerned that more will do so in response to the possibility of continued proceedings before the Board. Bobb V.S. at 4.

Although WCTL and AECC apparently believe that it is in the interest of some shippers to delay for as long as possible taking any steps to reduce coal dust fouling, the Board should not lend support to such shortsighted interests. While BNSF is doing its best to keep coal dust fouling under control, after-the-fact maintenance of rail lines does not eliminate the risk of a service interruption. In light of the large potential impact of a disruption of the Nation's energy supply caused by coal dust fouling, it is strongly in the public interest for the Board to allow BNSF to keep the coal dust rule in place and to continue working with its shippers toward effective reduction of coal dust in the PRB. If a dispute about enforcement arises in the future, a narrow injunction that would suspend the application of the rule to a particular common carrier shipper pending resolution of that dispute might be appropriate. But until such a dispute arises, the Board should leave the coal dust rule in place so that continued progress can be made.

IV. Conclusion

For the reasons discussed above, the Board should deny WCTL's Petition to Reopen and for Injunctive Relief Pending Board-Supervised Mediation.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Samuel M. Sipe, Jr.", is written over a horizontal line.

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August 23, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of August, 2011, I caused a copy of the foregoing to be served on the following Parties of Record by first class mail, postage prepaid:

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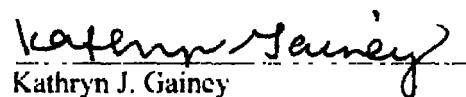
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35305

**PETITION OF ARKANSAS ELECTRIC COOPERATIVE
CORPORATION FOR A DECLARATORY ORDER**

VERIFIED STATEMENT OF STEVAN B. BOBB

My name is Stevan B. Bobb. I am Group Vice President, Coal Marketing for BNSF Railway Company. I previously submitted verified statements in this proceeding in support of BNSF's opening evidence on March 16, 2010, and BNSF's rebuttal evidence on June 4, 2010. I have reviewed WCTL's petition for reopening pending mediation and for injunctive relief. I am submitting this verified statement in support of BNSF's opposition to WCTL's request to reopen the coal dust proceeding to conduct Board-sponsored mediation and to stay or enjoin BNSF's recently issued coal dust car loading rule pending mediation.

As explained below, mediation with specific common carrier shippers could become an option in the future if disputes arise over compliance with BNSF's coal dust rule, but such mediation would need to be conducted with specific common carrier shippers, not with a trade association like WCTL. As to WCTL's request for an injunction, the Board has already agreed that something must be done about coal dust, but the entry of an injunction could bring to a halt the progress that BNSF and many of its shippers have been making over the past several months in implementing solutions to the coal dust problem in the Powder River Basin ("PRB").

Coal Dust in the PRB is an Urgent Problem that Must be Brought Under Control Without Further Delays.

BNSF has been working intensively on a solution to the coal dust problem since 2005. As the STB and FRA have acknowledged, coal dust is a harmful ballast contaminant that can destabilize track structure and lead to serious operating problems on high density PRB coal lines. The need to maintain a safe and efficient coal supply network is underscored by current challenges involving delays in coal deliveries resulting from severe flooding in the Midwest and resultant BNSF line outages.

BNSF established a coal dust car loading rule in 2009 that would have limited coal dust losses from loaded coal cars to specified levels. After a lengthy proceeding addressed to the reasonableness of that rule, the STB agreed that coal dust undermines ballast integrity and concluded that BNSF is entitled to establish car loading rules that would require shippers to take measures to contain coal dust in the loaded cars. The Board found that the BNSF's specific approach to coal dust containment was not reasonable as a result of uncertainties in BNSF's proposed approach to monitoring coal dust emissions and the fact that a coal shipper would not know when it loaded a train whether it would be in compliance with the rule. But the Board suggested that this problem could be addressed by establishing a safe harbor whereby shippers would be deemed in compliance with BNSF's operating rule by engaging in specified activities, such as the application of specific topper agents.

BNSF has followed the STB's direction and published a new car loading rule that includes a safe harbor for shippers that apply certain topper agents to loaded coal cars. BNSF's new rule also gives shippers the option of using other topper agents or other coal dust reduction techniques if the proposed method is shown to effectively reduce coal dust losses.

Thus, after years of study, BNSF has adopted a car loading rule, with a safe harbor, that will bring about a substantial reduction in coal dust deposits on critical PRB rail lines. BNSF has taken seriously the coal dust problem because it presents a significant risk to the integrity of PRB coal operations. Any delay in the implementation of a coal dust reduction program would increase the odds of a disruption to the PRB coal supply chain, which is vital to the national and world economy. This is an unacceptable risk.

Contrary To WCTL's Claim, BNSF Has Been Working Diligently With Its Shippers To Develop Feasible And Effective Coal Dust Mitigation Measures.

WCTL wrongly asserts that BNSF has refused to engage in meaningful dialogue with BNSF's shippers on the subject of coal dust mitigation, citing my decision not to engage in negotiations with WCTL on this issue. WCTL's suggestion that BNSF should negotiate with it over the terms of BNSF's coal dust mitigation rule is not realistic. Negotiations with WCTL over coal dust mitigation would be inappropriate. BNSF has been able to address the coal dust issue in one-on-one discussions with shippers because shippers have a variety of interests, as reflected by the terms of their confidential coal transportation contracts with BNSF, that can only be addressed through individual discussions. WCTL is not a coal shipper. Nor does WCTL represent the majority of BNSF's coal shippers.

BNSF does not believe that any progress would be made in discussing the details of its coal dust car loading rule with a shipper association like WCTL. WCTL's approach to the issue of coal dust in the past has been to deny that a problem exists and to resist efforts to bring coal dust fouling under control. At no time has WCTL proposed constructive solutions to the coal dust problem or tried to find a path forward on this issue. In contrast, BNSF has made progress by working directly with individual customers to implement a solution to the coal dust problem.

In addition, the *substance* of operating rules is not a proper subject of negotiation between railroads and their shippers. A railroad must have the ability to determine how to provide service to its shippers and to establish operating rules, such as loading requirements, that will facilitate efficient operations. However, I have made it clear to BNSF's coal shippers that BNSF is willing to work with individual customers regarding the timing and method of *implementation* of the coal dust loading rule.

The vast majority of BNSF's coal shippers are contract shippers. Our relationship with those shippers is governed by confidential contracts that are not subject to regulation. BNSF estimates that in 2011, those contracts will account for 88 percent of its coal tonnage. Almost 70 percent of those contracts contain provisions in which the shipper has agreed to implement coal dust remediation measures. BNSF has been working with its contract shippers to ensure implementation of effective coal dust remediation. The Board must avoid taking any action that could negate the progress BNSF has made in working with its contract shippers.

BNSF has been making substantial progress in working with individual shippers. Several shippers have already begun to implement measures to apply topper agents to loaded cars. At least three of BNSF's contract shippers, including large-volume shippers, are currently treating trains with topper agents. Other shippers have committed to apply topper agents. Four PRB mines are currently applying topper agents to loaded coal cars. Three other PRB mines have already selected a topper agent.

All of these efforts could come to a halt if the Board enjoins BNSF's revised coal dust tariff. Indeed, some shippers that began to apply topper agents to control coal dust have stopped. I am concerned that more will do so in response to the mere possibility of continued proceedings before the Board.

BNSF's Shippers Have Been Extensively Involved In Efforts To Develop An Appropriate Coal Dust Rule.

BNSF's development of the new coal dust car loading rule was not, as WCTL suggests, entirely a unilateral effort by BNSF. BNSF described in the prior coal dust proceeding the numerous studies and research that BNSF conducted of coal dust on PRB lines. BNSF's shippers and mines have also been extensively involved in field studies that are the foundation of BNSF's current coal dust rule. BNSF's coal dust rule is the result of a collaborative process to which shippers and mines have made substantial contributions.

The new rule is, in part, an outgrowth of an extensive field evaluation of coal dust suppressants in the PRB Super Trial conducted from March through September 2010. In the Super Trial, BNSF and UP, along with a group of shippers and mines, facilitated field testing of seven dust suppressant products to assess their effectiveness in reducing coal dust emissions. BNSF undertook the trial in response to requests from shippers. The purpose of the Super Trial was to provide information to coal shippers regarding coal dust suppression technologies to assist shippers and their mine agents in implementing effective coal dust curtailment measures. The shippers and mines were involved in the design of the field tests.

In fact, there was a Selection Committee in the Super Trial that consisted of several shippers and mines. The Selection Committee had significant input into the selected surfactants and testing procedures. BNSF and SWA had several meetings with the Selection Committee to discuss testing protocols and results. Six PRB mines and over a dozen shippers participated in Super Trial. BNSF provided detailed test results to all participants in the Super Trial, with commercially sensitive information deleted.

In addition to the Super Trial, I and others at BNSF have participated in numerous town hall meetings, coal conferences and other gatherings of coal shippers and mines. In these

meetings, BNSF has discussed extensively coal dust issues and our approach to a coal dust car loading rule with our customers. Over the last two years, BNSF's marketing and engineering employees have conferred on an on-going basis individually with our contract and common carrier shippers regarding coal dust remediation, topper application, and BNSF's coal dust car loading rule. During these conversations, BNSF has sought input from our shippers and mines, provided information, and responded to numerous questions.

BNSF has made repeated efforts in the past to obtain information from shippers and mines about their compliance plans to prepare for the implementation of coal dust remediation efforts. Several shippers and mines have already provided information on efforts they are taking to begin implementing coal dust remediation efforts. Moreover, prior to issuing the current rule, BNSF sent to a number of its shippers that participated in the Super Trial a draft of BNSF's proposed new coal loading rule, sought input on the rule, and received helpful comments.

Throughout this process, BNSF has made it clear that it has an open door policy and that we are willing to talk to any BNSF shipper on an individual basis about compliance with the revised coal dust tariff.

WCTL Misrepresents the Obligations that Shippers Have Under BNSF's Car Loading Rule.

In my discussions with BNSF's shippers, I have made it clear that BNSF's objective is to have compliance plans in place by October 1, 2011. I understand that the requirement in BNSF's coal dust rule to "take measures" by October 1, 2011, to reduce coal dust could be subject to different interpretations. As I have told individual shippers who have asked, under BNSF's rule it is BNSF's intent that this requirement means that a shipper must begin to take concrete steps toward compliance by having a compliance plan in place by October 1, 2011. We understand that full implementation of those plans may take some time. Given the amount of time that

shippers and mines have had to develop compliance plans, I find it hard to believe that shippers cannot have a compliance plan in place by October 1, 2011. No shipper has notified me that they cannot meet that date and no shipper has requested extension of that date. BNSF is willing to work with individual shippers if implementation issues arise, but after years of studying the coal dust problem and designing a solution, it is time for coal shippers to take concrete steps toward implementing mitigation measures. The first step for each shipper is to develop a compliance plan, and there is no reason to delay that important first step.

BNSF's current coal dust rule does not specify enforcement measures. The majority of coal that BNSF transports from the PRB is transported under confidential contracts with individual shippers. Almost 70 percent of BNSF's contracts contain provisions regarding coal dust remediation. These provisions result from private negotiations between BNSF and individual shippers. The Board does not have authority over the enforcement of coal dust remediation provisions in contracts with individual shippers.

As to BNSF's common carrier shippers, BNSF expects that our shippers will comply with the coal dust rule and at this time there is no need for specific enforcement provisions. BNSF expects that its shippers will take good faith measures toward coal dust reduction, and those efforts begin with a shipper's written compliance plan. If a common carrier shipper's compliance plan reasonably demonstrates that the shipper will take measures to apply one of the specified safe harbor toppler agents or will adopt some other effective coal dust mitigation measures within a reasonable time period, BNSF will not need to pursue any enforcement measures. If, contrary to our expectations, it should become necessary to take enforcement action with respect to one or more individual common carrier shippers, as we have represented before BNSF will provide 60 days' advance notice before implementing any enforcement action,

enough time to allow any affected common carrier shipper to seek Board intervention if it chooses to do so.

This approach is consistent with a new Joint Line operating rule that BNSF has established which applies to shipments on UP as well as BNSF. That rule includes the same 85% coal dust reduction requirement and the same safe harbor provisions as the operating rule in BNSF Price List 6041-B, which is the subject of WCTL's petition. The Joint Line rule states that all shippers must be in compliance with these requirements "as soon as practicable."

WCTL also complains about the liability provisions in BNSF's car loading rule, but those provisions are consistent with industry practice on loading rules. The party responsible for loading a car is liable for the consequences of its loading activity. WCTL says that it is unfair for BNSF to mandate topper application and then impose liability for adverse effects of the application. But BNSF has not mandated any particular coal dust mitigation approach. BNSF has offered shippers a safe harbor if they apply specified topper agents. If a shipper has a better alternative, BNSF has not foreclosed that alternative. If a shipper chooses to use the safe harbor approach, the shipper and its mine agents will be in charge of applying the topper agents and they should be the persons responsible for any adverse effects. BNSF should not be required to assume liability for actions the shippers must take to keep their coal in loaded cars.

If Disputes Arise With BNSF's Common Carrier Shippers Over The Implementation Of A Specific Compliance Plan, Mediation May Become An Option At That Time.


As explained above, BNSF has already been involved in discussions with a significant number of its coal shippers about their plans to comply with the revised coal dust tariff. BNSF needs to have the opportunity to continue working one-on-one with its shippers to address specific compliance measures that shippers intend to take. If these efforts are unsuccessful and a concrete dispute with a common carrier shipper arises, mediation may become an option.

However, such mediation would only be appropriate with particular BNSF common carrier shippers of PRB coal, and not with a trade association like WCTL.

BNSF is willing to discuss the revised coal dust tariff with any BNSF shipper that wishes to do so. The members of WCTL who are BNSF shippers should not hesitate to contact BNSF if they have questions or concerns regarding implementation of coal dust mitigation measures or their compliance plans. However, these communications must be on an individual basis.

I declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on August 22, 2011



Stevan B. Bobb

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35305

**PETITION OF ARKANSAS ELECTRIC COOPERATIVE
CORPORATION FOR A DECLARATORY ORDER**

VERIFIED STATEMENT OF DR. G. DAVID EMMITT

My name is G. David Emmitt. I am the President and Senior Scientist of Simpson Weather Associates ("SWA"). SWA is a scientific consulting firm, focusing on applied solutions to complex environmental issues. For over twenty-five years, I have worked at SWA on researching and developing solutions to the problems posed by fugitive coal dust. I submitted verified statements on behalf of BNSF Railway Company ("BNSF") earlier in this proceeding. As I described in those prior statements, SWA has worked closely with BNSF for the past six years to monitor coal dust emissions from moving trains in the Powder River Basin ("PRB") and to investigate various means to limit the loss of coal dust while in transit. In this statement, I respond to the comments of Western Coal Traffic League ("WCTL") and the verified statement of Mark J. Viz in WCTL's petition to reopen.

First, I am surprised by the suggestion in Dr. Viz's statement that the use of topper (or binding) agents on loaded coal cars may not be an effective way to address coal dust losses on moving coal cars. In Dr. Viz's prior work with Exponent (discussed at some length in the prior proceedings in this case), Dr. Viz recognized that it was possible {

}¹ Exponent Inc.,

Railcar Coal Loss and Suppressant Effectiveness Study: Final Report to the National Coal Transportation Association, Executive Summary, page xiv (Aug. 3, 2009) ("Exponent Report").² Indeed, if application of topper agents to loaded coal cars were not an effective means of reducing coal dust losses, why has every major coal industry participant that has sought to reduce coal dust emissions from moving coal cars chosen to use topper agents as the remediation methodology? As discussed in the prior proceedings, topper agents are used in Canada, Australia, China and by Norfolk Southern in Virginia to control coal dust losses. To suggest that application of topper agents may not be an appropriate method to control coal dust on loaded coal cars is without merit.

It is true, as Dr. Viz suggests, that different topper agents have different degrees of effectiveness. But it is unnecessary to engage in a debate over the effectiveness of different topper agents because BNSF's coal dust rule gives shippers a safe harbor if they choose to use specific topper agents, and also gives shippers the opportunity to demonstrate that alternative agents or dust suppression methods are effective. I worked with BNSF in the field testing that was carried out to select the safe harbor topper agents that BNSF has identified. I am confident that the tests were done appropriately and that the relative effectiveness of the selected agents was determined with care and under appropriate circumstances, including weather and train speed conditions. But even if Dr. Viz had valid concerns about the test results on the topper agents selected for the safe harbor (and I do not believe those concerns to be valid), the safe

¹ Confidential materials are designated with single brackets – "{".

² The Exponent Report was at produced at bates number AFS0007686 and was contained on the CD in the "Emmitt" folder in Appendix B to Counsel's Reply Argument in BNSF Railway Company's Reply Evidence (filed April 30, 2010).

harbor still applies to shippers using the selected topper agents. And if a shipper believes that an alternative topper agent is better, BNSF's rule specifically states that a shipper could use other topper agents, or other methodologies altogether, so long as the alternative is shown to reduce coal dust losses by 85%.

In any event, Dr. Viz's supposed concerns about the testing that was done to select the safe harbor topper agents are misplaced. The tests were conducted in a large-scale field evaluation called the "super trial" conducted between March and September 2010. The super trial tested seven different chemical agents: four were body treatments (applied before the coal is loaded in the car) and five were topical treatments (sprayed to the top of coal once loaded). One hundred fifteen (115) trains were tested using passive dust collectors combined with mobile weather and dust monitoring stations attached to the rear chord of coal cars. A passive collector is a wind-tunnel designed instrument which collects a portion of the coal blown from the tops of railcars during the course of a movement. On each of the 115 trains, passive dust collectors were attached to the rear sill of seven treated and seven untreated cars. The relative quantity of coal dust that had accumulated in the dust collectors on treated and untreated cars during the trip was compared to determine the relative reduction in the captured coal dust for each tested chemical agent.

Most of the questions raised by Dr. Viz are irrelevant because they involve the difficulty in predicting the specific quantity of coal dust that could be expected to be blown off of a particular train, as opposed to the relative amount of coal dust blown out of treated and untreated cars on the same train. For example, Dr. Viz's questions about "sampling efficiency" and varying weather conditions might be worth considering if one were trying to predict the specific volume of coal dust that would be emitted from a train treated with a particular chemical binding

agent. But BNSF's objective was to determine whether a specific chemical could be expected to reduce coal dust losses by a certain percentage - 85%. Dr. Viz misunderstood, or ignored, BNSF's objective.

Dr. Viz also criticizes the procedures used during the super trial, noting that there should be a "well-defined, written protocol that all field personnel obey." Viz V.S. at 8. Dr. Viz's comments about the methodology used in the super trial have little to do with the substance of BNSF's coal dust rule. In my view, the super trial was conducted in an orderly and responsible manner. The procedures followed in the super trial protocol were developed with input from a Selection Committee, which consisted of mines and shippers. The chemical vendors, who have extensive experience in both laboratory and field evaluations, agreed to the testing protocol. SWA worked with BNSF to carry out the tests, and we had a number of meetings with the Selection Committee over the course of the super trial to discuss progress of the testing and to answer specific questions about the tests. Moreover, the data collected from the Tracksides Monitors and passive collectors from all useable trains tested were provided to all participating mines and utilities, minus train identification. The mines and shippers participating in the trial had numerous opportunities to raise concerns about methodology at any step of the process.

Dr. Viz also argues that the selection of safe harbor agents based on passive collector results from 115 trains is not appropriate because 115 trains is too small a sample to produce statistically significant results. Viz V.S. at 10. I disagree. It is possible to make a valid statistical inference based on a very small number of samples in tests such as those carried out with passive collectors in the super trial, where the relative impact of the topper agent is based on results from several treated cars and several untreated cars on the same train and thus experiencing the same weather and the same trip stresses.

PUBLIC VERSION

Finally, I note that Dr. Viz's questions about the utility of passive collector tests are also contrary to the views he expressed in the prior Exponent report. {

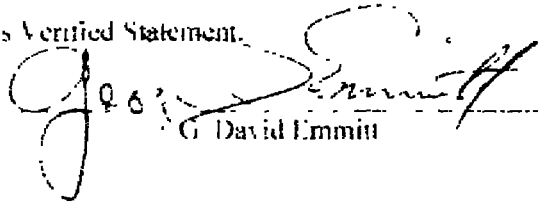
} Exponent Report at 76.

The Board should be very skeptical of Dr. Viz's apparent about face on the utility of passive collector tests in his most recent statement, as it should be skeptical of his current criticisms of topper agents, which he previously recognized {

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I declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on August 22, 2011


G. David Emmitt